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No. 673

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

H. B. NELSON CONSTRUCTION COMPANY,
PETITIONER

v.

THE UNITED STATES

REPLY BRIEF FOR PETITIONER.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.
CHARLES W. WARDEN, WASHINGTON REPRESENTATIVE,
TOWER BUILDING

INDEX

PAGE

Reply Brief 1
POINT I: The multitude of changes outside of the contract..... 1
POINT II: The Release 4
POINT III: Roads, Windows and Screens, and Helix Ceiling..... 6
Conclusion 7

CITATIONS

Am. Jur. Vol. 20, § 1180, ps. 130-132..... 2
Bates & Rogers Const. Co. v. Bd. of Com'rs., 274 F. 659, 667..... 3
Bach v. Iowa R. Co., 112 Iowa ..., 83 N. W. 959..... 6
Chesapeake & O. R. Co. v. Martin, 283 U. S. ps 209, 216, 219..... 2
Cyc. of Ev. Vol. 9, p. 967..... 3, 4
Cyc. of Ev. Vol. 14, p. 175..... 3, 4
Clark—Architect, Owner & Builder, p. 291..... 4
Chitty on Contracts, 18th Ed. § 4, Ch. XXIII. p. 873..... 5
Campbell v. Russell, 139 Mass. 278, 1 N. E. 345..... 6
Drainage Dist. No. 1 v. Rude, 21 F. (2d) 257, 261..... 3
Emden's Building Contracts Etc., 4th Ed. Ch. 14, p. 190..... 4
Henderson Bridge Co. v. McGrath, 134 U. S. 260..... 3
Hull v. Littaur, 162 N. Y. 569, 572, 573..... 2
Keene v. Gauen, 22 F. (2d) 723, 724..... 5
Mattack Coal & Iron Co. v. N. Y. Quebracho Ex. Co., 32 F. (2d) 275..... 5
Mass. Bonding & Ins. Co. v. John R. Thompson Co., 88 F. (2d) 825, 829. 3
Owensboro Ditcher & Grader Co. v. Markham, 32 F. (2d) 564, 565..... 5
Plum Bayou Levee Dist. v. Roach, 174 F. 953..... 4
Pollocks Principles on Contracts, 9th Ed. 545..... 5
Sartoris v. Utah Const. Co. et al., 21 F. (2d) 1, 3..... 4
Salt Lake City v. Smith, 104 F. 457, 466..... 3
Union Pacific R. Co. v. Callaghan, 161 U. S. 461..... 6
U. S. v. Barlow, 184 U. S. 132, 138..... 4, 7
U. S. v. Goltra, 85 L. Ed. 450..... 2
Waste in Industry, p. 72..... 4

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I.

This action is to recover the value of work started under a contract, to be performed "in strict accordance with the specifications" (R. 6), (1) which petitioner claims was abandoned through respondent's making, as is conceded, 64 major changes,—one every third day for most of the time, and every fourth day for the remainder (R. 17, 18), and many changes from day to day for the 400 days the work was being done (R. 29); and (2) because respondent compelled petitioner to construct the buildings in an experimental way,—ordering one thing today, and directing it torn down tomorrow. (Ptnr's. Orgnl. Brf. Nos. 3, 4, 5, ps. 29, 30, 31.) Petitioner protested repeatedly against respondent's changes, mistakes, and delays. (*Id.* Petition p. 9, Par. 3.)

Respondent makes two answers,—

First, that proof of the minor changes was made by the petitioner's testimony only, and that the Court was not bound to believe him (Rspdt's. Brf. p. 7); and, second, that there has been no decision by this Court that such changes,—major or minor,—justify a *quantum meruit* recovery *(Id.* p. 6), and that, although petitioner so testified without dispute, these many changes were not experimental, and an exercise of unwarrantable superintendence *(Id.* 7).

(1) Respondent has so acted as to certify that petitioner's testimony was true:—

(a) All respondent's employees knew the facts to which petitioner testified, and could have contradicted him if he had varied at all from the truth. Yet no one of them,—not even those testifying,—contradicted him. By failing to contradict petitioner, respondent vouched conclusively for his credibility and his testimony. Under such circumstances petitioner's testimony is binding and conclusive. (Chesapeake & O. R. Co. v. Martin, 283 U. S. ps. 209, 216, 219 incl.; 20 Am. Jur. § 1180, ps. 130 to 132 incl.; Hull v. Littaur, 162 N. Y. 569, 572, 573.)

United States v. Goltra, 85 L. Ed. 450, holds that the Court was not bound to give weight to the testimony of petitioner because it was highly speculative. It was not on the question involved here whether petitioner's testimony was conclusive in view of his interest.

(b) But petitioner does not stand alone in his testimony. All respondent's employees, through respond-

ent's failure to question them,—even those who were witnesses,—it is presumed would have testified just as petitioner did. (9 Cyc. of Ev. 967; 14 Cyc. of Ev. 175.)

(2) That such a multitude of changes,—both major and minor,—entitles petitioner to recover on a *quantum meruit* is held by the technical works on building, and by the Courts, because only in this way can justice be done.

This Court held that a direction to a railroad contractor to make a continuous embankment instead of borrow pits made a new contract. (Henderson Bridge Co. v. McGrath, 134 U. S. 260.)

> "Material quantities of work required by such alteration, that are substantially variant in character and cost from that contemplated by the parties when they made their agreement, constitute new and different work, not governed by the agreement, for which the contractors may recover its reasonable value." (Salt Lake City v. Smith, 104 Fed. 457, 466,—quoted and approved in Drainage Dist. No. 1 v. Rude, 21 F. (2d) 257, 261.)
>
> "Nor do these provisions" (of the contract) "deprive the plaintiff of his right to recover damages for a substantial breach of the contract, due to substantial change or modification of the general plans and specifications." (Bates & Rogers Const. Co. v. Board of Com'rs., 274 F. 659, 667.)
>
> "* * * changes not fairly within the contemplation of the parties at the time the contract was made—changes constituting a material departure from the original undertaking—do not come within its terms * * *." (Mass. Bonding & Ins. Co. v. John R. Thompson Co., 88 F. (2d) 825, 829.)

As there were radical changes in the construction, necessitating additional cost (R. 28-31), petitioner is entitled to recover therefor. (Sartoris v. Utah Construction Co. *et al.*, 21 F. (2d) ps. 1, 3.)

Plum Bayou Levee Dist. v. Roach, 174 F. 953 holds that changing line of levee from dry to swampy ground constituted a breach of contract.

The textbooks on building construction hold that to avoid delays and increased cost the work must be carefully planned, and the plan followed, and that where there are substantial changes

> "a reasonable valuation of the work done and materials delivered constitutes the only means by which the builder can be fairly compensated." (Clark,—Architect, Owner & Builder, p. 291; Emden's Building Contracts, etc., 4th Ed. Ch. 14, p. 190; Waste in Industry, p. 72.)

(3) Petitioner's testimony is undisputed that the buildings were built through experiments (R. 29; Ptnr's. Orgnl. Brf. par. 5, ps. 30, 31),—building and finding that what was built did not answer its needs, and tearing down and rebuilding, and, as respondent's employees knew the facts and they, (even those who testified), did not dispute this, it is presumed that, if questioned, they would have testified the same way. (9 Cyc. of Ev. 967; 14 Cyc. of Ev. 175.) This entitles petitioner to recover the value of the work. (U. S. v. Barlow, 184 U. S. 132, 138.)

II.

Respondent makes several answers to petitioner's contention that the release covered only what respond-

ent conceded to be due, and did not extend to the present claim for damages.

(1) Respondent urges, on the authority of Williston on Contracts, that, as the right to receive a release was reserved by the contract, the exacting it was not duress. Requiring a release is not the question involved, but its effect: Petitioner urges that it does not extend to the damages he seeks. Of course, respondent had the right under the contract to a release of what was due on the contract. It had no right to a release of the damages outside the contract, and compelling a general release alleged to cover the damages was duress.

(2) Next, respondent urges that the damages are included because they arise "by virtue of the contract."

(a) As appears herein above under (2) and (3) of Point I, the extra work and cost caused by the changes did not arise "by virtue of the contract," but because of respondent's many breaches of it, entitling petitioner to his damages.

> "But where" (as here) "there are two claims, dependent on different facts, one of which is undisputed and the other of which is disputed, the payment of the undisputed claim does not bar the right to sue for and recover on the disputed claim." (Keene v. Gauen, 22 F. (2d) 723, 724.)
>
> (See also Owensboro Ditcher & Grader Co. v. Markham, 32 F. (2d) 564, 565; Mattack Coal & Iron Corp. v. New York Quebracho Extract Co., 32 F. (2d) 275, 276; Pollocks Principles of Contracts, 9th Ed., 545; Chitty

on Contracts, 18th Ed. § 4, Ch. XXIII, p. 873; and the authorities cited under Point IV of Petitioner's original Brief pages 35 to 37 incl.)

III.

In answer to respondent's notes pages 7 and 8,—as to the road roller,—the fact that the roller was somewhat smaller than the specifications prescribed is unimportant: The Trial Court found that the roller was so heavy that the road curled up in front of it, and forced the rock into the ground (Finding 8, R. 16), so that the road had to be refinished at an extra cost of $5500 for rock and roller rent. The evidence that the roller was not too heavy for other roads constructed with the same specifications was incompetent in the Federal Courts, because this would involve the collateral issue as to similarity. (Union Pacific R. Co. v. Callaghan, 161 U. S. 461.)

And it is incompetent even in the State Courts because there was no evidence of similarity of the roads, but only of the specifications: The foundations of the other roads may have been rock, and that of this road was mud. (Bach v. Iowa R. Co., 112 Iowa , 83 N. W. 959; Campbell v. Russell, 139 Mass. 278, 1 N. E. 345.)

Windows and Screens.

This is fully covered in Petitioner's original brief in (b) Point II, page 33.

Ceiling.

This is also fully covered in petitioner's original brief under (c) of Point II, page 34, except that re-

spondent claims that the sweating process was successfully used elsewhere. This evidence is incompetent for the reasons shown above as to its being introduced regarding the roller.

Conclusion.

Respondent urges that certiorari should be denied because there is no conflict of decisions, and no question of importance is involved.

The decision here is in conflict with,—

(1) All of the authorities cited under Point I on petitioner's right to recover damages because of the multitude of both major and minor changes made by respondent;

(2) With U. S. v. Barlow, 184 U. S. 123, 135 to 138 incl., as to petitioner's right to recover because respondent forced him to build in an experimental way;

(3) With the authorities cited by petitioner under Point I of this and Point IV of his original brief, showing that petitioner is not bound in this action for damages by the release given on payment of what respondent conceded was due under the contract;

(4) With the authorities cited in this brief under Point III and in his original brief under Point II, as petitioner's right to recover for extra work and expense as to the roller, the window screens, and the ceiling;

(5) With the authorities cited by petitioner on delays under Point V of his original brief;

(6) With petitioner's right to controlling Findings, (1) that there were many day to day changes the 400 days the work continued; (2) that the multitude of changes entitled petitioner to recover the reasonable value of his work; (3) that respondent compelled petitioner to build in an experimental way; (4) that petitioner is entitled to recover because of this; (5) that respondent breached its warranty that the roller it compelled petitioner to use was suitable for the work, entitling petitioner to recover his loss; (6) that the window screens were inspected and approved; and that this was binding because the alleged defect was visible, entitling petitioner to recover for the extra work respondent required him to do; (7) that respondent required petitioner to experiment in putting up the ceiling, entitling him to recover.

It is respectfully urged that certiorari be granted.

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